IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

ERNEST L. MONTANYE, Superintendent of Attica Correctional Facility and HAROLD SMITH, Deputy Superintendent of Attica Correctional Facility,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

MOTION FOR EXPEDITED CONSIDERATION OF PETITION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1973

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ERNEST L. MONTANYE, Superintendent of Attica Correctional Facility and HAROLD SMITH, Deputy Superintendent of Attica Correctional Facility,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

MOTION FOR EXPEDITED CONSIDERATION OF PETITION

To: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners respectfully move, on the grounds set forth below, for expedited consideration of the petition for a writ of certiorari herein, and if certiorari is granted, for expedited argument so that this case may be heard together with *Preiser* v. *Newkirk, cert. granted,* 43 U.S.L.W. 3223 (No. 74-107, October 21, 1974). The instant petition presents the question of whether a prison inmate who is transferred within a state from one maximum security institution to another maximum security institution, without the imposition of any disciplinary punishment, is entitled

under the Due Process Clause of the Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard.

Preiser v. *Newkirk* involves a similar question concerning the intrastate transfer of an inmate from a medium security institution to a maximum security institution. Heard together these two cases will present to this Court the two common types of intrastate transfers which have been the basis for conflicting decisions in the federal courts on the issue of the process due to the inmate being transferred (*post* at 8-10). Insofar as the federal courts have differentiated between transfers at the same custody level and those which alter custody classification, these two cases will provide the Court with an opportunity to rule on these two situations.

WHEREFORE, petitioners respectfully request that this Court expedite consideration of the within petition for a writ of certiorari, and if the petition be granted, expedite argument so that the case may be heard together with *Preiser* v. *Newkirk*.

Dated: New York, New York
October 31, 1974.

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IN THE

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No.

ERNEST L. MONTANYE, Superintendent of Attica Correctional Facility and HAROLD SMITH, Deputy Superintendent of Attica Correctional Facility,

Petitioners,

against

RODNEY R. HAYMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ernest Montanye, former Superintendent of Attica Correctional Facility and Harold Smith, former Deputy Superintendent of Attica Correctional Facility, pray for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Rodney R. Haymes* v. *Montanye*, which was decided on October 4, 1974. The decision reversed an order of the United States District Court for the Western District of New York, dated June 4, 1973, dismissing the complaint in a civil rights action brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343.*

* Although the case was captioned as a habeas corpus proceeding in the lower courts, it has been treated throughout as a civil rights action.

Opinions Below

The decision of the Court of Appeals is not yet reported and is reproduced herein as Appendix "A". The decision of the District Court is not yet reported and is reproduced herein as Appendix "B".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on October 4, 1974.

Question Presented

Whether a prison inmate who is transferred within a state from one maximum security institution to another maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause of the Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard?

Statement of the Case

A. Facts

On June 7, 1972 respondent Rodney R. Haymes, a New York State inmate, was confined at the Attica Correctional Facility, Attica, New York. On the morning of June 7 Haymes was discharged from his job as an inmate law clerk in the Attica law library. During the afternoon of the same day, prison authorities took from Haymes a document which he was circulating among the inmates in a recreation yard at Attica.

In his complaint, Haymes himself denominated the document as a "legal petition" for the "redress of grievances." The writing, prepared by Haymes at the request of other

inmates, is addressed to Judge Curtin of the United States District Court for Western District of New York and is signed by 82 inmates, not including Haymes. The writing did not make a demand for relief but complained that the removal of Haymes and another inmate from their jobs as law clerks had deprived the signatories of legal assistance and access to the courts. It also complained of the allegedly obstructionist attitude of the correction officers in charge of the law library.

The confiscation of the document was based on paragraph 21 of the Inmates Rule Book, which states:

> "21. Inmates are prohibited except upon approval of the Warden, to assist other inmates in the preparation of legal papers."

Haymes had not requested permission to circulate the document nor had any inmates requested that he be permitted to assist them. Although the document was confiscated by the prison authorities, Haymes was not disciplined in connection with the incident.

On June 9, 1972 Haymes was transferred from Attica Correctional Facility to Clinton Correctional Facility. Both of these facilities are maximum security institutions within the State of New York. Haymes was not subjected to any disciplinary action or punitive confinement upon his arrival at Clinton.

B. Prior Proceedings

Haymes commenced this action in the United States District Court for the Western District of New York. He alleged that his transfer was in retaliation for his disobedience to the legal assistance rule and violated his right to due process since he was not given a hearing. Haymes also claimed that the petition was special correspondence, protected by the Department's own rules, which could not

be confiscated.* He did not seek equitable relief but requested $1,500 in compensatory damages and $1,500 in punitive damages.

Affidavits from petitioner Smith and the correction officer in charge of the law library were submitted to explain Haymes' discharge and the confiscation of the document. Petitioner Smith relied on the legal assistance rule in the prison rule book (*ante* at 5) as well as a notice posted in the cell blocks which stated, *inter alia:* "Under no circumstances are inmates to set themselves up as 'legal counselors' and receive pay for their services." Smith also stated that Haymes had been cautioned on several occasions about rendering legal assistance to other inmates without their having requested assistance.

On June 4, 1973 the District Court dismissed the complaint. Since there was no allegation of harsher or substantially different conditions at Haymes' new place of confinement, the Court held that Haymes' summary transfer from one maximum security facility to another did not violate his rights (A. 15a-16a).** The Court upheld the confiscation of the petition as enforcement of a reasonable prison rule regulating inmate legal assistance (A. 14a-15a). As the Court aptly noted, the confiscation in no way infringed *Haymes'* right to communicate with the court or counsel (A. 15a).

Haymes appealed the order dismissing his complaint to the Court of Appeals for the Second Circuit. On October 4, 1974 the Court of Appeals reversed the order of dismissal. The Court rejected the lower court's holding that a transfer between two maximum security institutions with similar programs was insufficient to warrant a hearing, irrespective

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* Department of Correctional Services' Administrative Bulletin #20 states that letters to public officials will not be read or censored.

** All numbers in parentheses preceded by the letter "A" refer to the Appendices herein.

of the motive for the transfer. The Court held that Haymes must be given an opportunity in court to prove that the transfer was punitive and that he suffered adverse consequences as a result of the transfer (5a-10a).

The Court stated that a transfer intended as punishment requires a hearing to ascertain the facts upon which the intended punishment is predicated, to assess the effect of the transfer on the inmate's future incarceration, and to give the inmate "a satisfactory opportunity to establish that he is not deserving of such handling" (A. 7a).* The absence of such a hearing, however, would not establish a violation of an inmate's constitutional rights unless he could also prove that the transfer had sufficiently adverse consequences so that the move could be characterized as punitive (A. 9a).

The Court stated that the maximum security classification of the two institutions was not dispositive and that the "hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial establishes that it was punitive—a denial of due process" (A. 10a). The Court then enumerated several possible consequences which might result from a transfer, including distance from family and counsel; removal from his friends; the possibility of property loss during the move; interruption of programs; and possible adverse inferences which might be drawn by the Parole Board from the transfer notation on the inmate's record (A. 10a-11a).

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* Although the Court did not state that notice of the reasons for the transfer was required, such a requirement may be inferred from the opinion. Since the Court held, in effect, that Haymes was entitled to the same due process before a punitive transfer as would be required for punishment within the facility, notice of the reasons for the transfer would be mandated. In discussing non-punitive transfers, the Court said "the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee" (A. 6a).

Having decided that Haymes was entitled to an opportunity to prove that the transfer was punitive and its consequences adverse, the Court of Appeals did not reach the issue of whether the confiscated petition was special correspondence protected by Administrative Bulletin # 20. The Court noted however that the characterization of the document as a letter and the fact that it demanded no relief would not automatically withdraw its circulation from the category of assistance prohibited by the prison's legal assistance rule (A. 11a-12a).

Reasons for Granting the Petition for Certiorari

This Court should decide whether an inmate transferred within a state from one maximum security institution to another maximum security institution, without the imposition of disciplinary punishment, is entitled to notice and a hearing under the Due Process Clause.

On October 2, 1974 this Court granted the petition for certiorari in *Preiser* v. *Newkirk,* 43 U.S.L.W. 3223. The question presented in *Preiser* v. *Newkirk* [hereinafter *Newkirk*] is similar to that raised in the instant case except that *Newkirk* involves a transfer to higher security institutions while the case at bar concerns a transfer between two institutions of the same security classification.

The question of whether prisoners who are transferred between penal institutions are entitled to some form of due process procedures is one which has divided the lower federal courts in this country. Some courts have held that such transfers, whether interstate or intrastate, require no due process while others have held that such transfer must be accompanied by due process guarantees. The latter decisions have varied as to the procedural elements necessary to meet the due process requirement. Some of the courts have distinguished between transfers which entail a change in security or custody classification, like

Newkirk, as opposed to those which involve no change in security level, like the case at bar. By granting the petition for certiorari in *Newkirk,* this Court has recognized the need for resolving this troubling area of the law.

Those decisions involving the intrastate transfer of prisoners have produced conflicting results. In *Schumate* v. *People of the State of New York,* 373 F. Supp. 1166 (S.D.N.Y. 1974) and *Beatham* v. *Manson,* 369 F. Supp. 783 (D. Conn. 1973), two courts in the Second Circuit held that transfers between state institutions did not require due process procedures unless there was an adverse change in custody level. The plaintiff in *Schumate* was moved from one maximum security facility to another, like the respondent in the instant case. The plaintiff in *Beatham* was transferred from a higher to lesser security institution. In *Benfield* v. *Bounds,* 363 F. Supp. 160 (E.D.N.C. 1973), the Court held that a transfer between state penal institutions was entirely a matter of administrative discretion. The *Benfield* plaintiff was transferred from one medium custody facility to another. In *Bundy* v. *Cannon,* 328 F. Supp. 165 (D. Md. 1971), the Court held that transfers between institutions of different custody levels required no hearings, although placement in segregation at the receiving institution created the need for due process procedures. In *Gray* v. *Creamer,* 465 F. 2d 179 (3rd Cir. 1972), the Court found no merit to a complaint alleging a summary transfer since a state prisoner has no constitutional right to remain in any particular prison.

Other courts considering intrastate transfers have mandated some due process when the character of the institution has changed. *Newkirk* v. *Butler,* 499 F.2d 1214 (2d Cir. 1974), *cert. granted sub nom. Preiser* v. *Newkirk,* 43 U.S.L.W. 3223 (No. 74-107, October 21, 1974) [medium to maximum security facility]; *Stone* v. *Egeler,* 377 F. Supp. 115 (W.D. Mich. 1973) [change of custody level plus distance of new institution]; *White* v. *Gilman,* 360 F. Supp.

64 (S.D. Iowa 1973) [reformatory to long term adult prison]. See *Clonce* v. *Richardson,* 379 F. Supp. 338 (W.D. Mo. 1974) [segregated confinement to behavior modification program]. In *Aikens* v. *Lash,* 371 F. Supp. 482 (N.D. Ind. 1974), the Court held that state inmates who were transferred from a reformatory to a penitentiary and routinely placed in punitive segregation at the penitentiaries were entitled to due process hearings.*

Those cases involving interstate transfers of state and federal prisoners have been equally inconsistent. Some courts have held that inmates who are transferred between states have no right to due process procedures, *Fajeriak* v. *McGinnis,* 493 F. 2d 468 (9th Cir. 1974); *Hillen* v. *Director,* 455 F. 2d 516 (9th Cir. 1972), *cert. denied* 409 U.S. 989 (1972), even if the transfer is to an institution of a stricter security classification. *Batchelder* v. *Kenton,* —— F. Supp. ——, 3 Prison L. Rptr. 93 (C. D. Cal. 1974).

Some courts considering interstate transfers have required full due process procedures including notice, an opportunity to be heard and to confront adverse witnesses, representation by a law advocate, a record of the proceedings, and review. *Kessler* v. *Cupp,* 372 F. Supp. 76 (D. Ore. 1973); *Ault* v. *Holmes,* 369 F. Supp. 288 (W.D. Ky. 1973); *Hoitt* v. *Vitek,* 361 F. Supp. 1238 (D.N.H. 1973). Other courts have mandated less extensive due process procedures. E.g. *Gomes* v. *Travisono,* 490 F. 2d 1209 (1st Cir. 1973), vacated and remanded, —— U.S. ——, 42 U.S.L.W. 3709 (July 8, 1974); *Croom* v. *Manson,* 367 F. Supp. 586 (D. Conn. 1973); *Park* v. *Thompson,* 356 F. Supp.

* Those cases concerning federal prisoners have been no more consistent. In *United States ex rel. Gallagher* v. *Daggett,* 326 F. Supp. 387 (D. Minn. 1971), an inmate challenged his transfer to a higher security prison. The Court held that the transfer was not subject to judicial review. In *Walker* v. *Hughes,* 375 F. Supp. 708 E.D. Mich. 1974), the Court held that due process was required before transferring an inmate from a medium, young offender institution to a maximum, adult facility.

783 (D. Ha. 1973); *Capitan* v. *Cupp,* 356 F. Supp. 302 (D. Ore. 1972).

It is apparent from these conflicting decisions that this Court should resolve the transfer issue at the earliest possible date for the benefit of prison inmates as well as prison administrators, who rely on transfers as one of the primary management tools for the protection and rehabilitation of inmates. In addition this Court should resolve the legal issue at the heart of the transfer cases, that is, whether the Due Process Clause applies to all losses of privilege and all deprivations that are suffered by an inmate during the course of his confinement.

It is undisputed that Haymes suffered no disciplinary punishment, special confinement, or loss of good time as a result of his violation of the Attica legal assistance rule, either at Attica or Clinton. Nor was he subjected to any disciplinary action as a result of his transfer, such as punitive segregation at the receiving institution. The court below based its ruling on the need for a hearing when a transfer is punitive and when the consequences of the transfer are sufficiently adverse to be characterized as punitive. These suggested guidelines are vague and unworkable criteria to determine when due process is owed to an inmate being transferred. In addition, they are inconsistent with the Court of Appeals' prior decision in *Newkirk.*

In *Newkirk* the Court of Appeals specifically rejected classification by label (e.g. "administrative" or "disciplinary") as the criterion for determining what process is due the transferred inmate. Rather, the Court there held that the determinative factor in determining due process is the loss suffered as a result of the transfer. The loss must be a "very real" and "substantial" loss to invoke a notice and hearing. Thus, the State may not defeat an inmate's right to due process by labeling his transfer nonpunitive.

Now, by its decision in the instant case, the Court has apparently held that the inmate himself may classify by label, that is, an inmate who merely alleges that a summary transfer was punitive must now be given an opportunity in court to prove that allegation and the adverse consequences of the transfer. Conceivably such an allegation will be made by any inmate who finds a transfer undesirable and seeks readmission to the transferring institution. Given the exigencies of prison life, an inmate is likely to find some incident or reprimand in the weeks immediately preceding the transfer, for which he may not even have been disciplined, and claim that the transfer was intended to punish him for that incident, minor as it may have been. A further difficulty with allowing such classification by the inmate is illustrated by the situation wherein a transfer is made in consequence of a review of an inmate's entire correctional record with a resulting decision that a program transfer is in order for rehabilitative purposes. The review may be triggered by a rule violation for which the inmate has already been disciplined. If the program transfer occurs on the heels of the rule violation, an inmate may now characterize the transfer as punitive and must be given his day in court. The correctional authorities must then appear to justify their decision to transfer as one based on the rehabilitative factors which are often utilized to transfer inmates.

Moreover, the Court of Appeals has apparently abandoned the *Newkirk* holding that due process is invoked when an inmate suffers a *substantial* loss as a result of the transfer. It was not a mere transfer which entitled Newkirk to notice and a hearing, but a change of custody transfer which involved deprivations of favorable living conditions and employment and training opportunities. However, in the instant case the Court stated that the "hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial

establishes that it was punitive—a denial of due process" (A. 10a). Although Haymes had never claimed that he was subjected to adverse consequences as a result of the transfer, the Court proceeded to suggest what these factors might be. They included distance from family, possible loss of property, interruption of programs, loss of friends, administrative segregation at the receiving facility, difficulty in contacting counsel, and the necessity to make an adjustment to a new environment.

The Court of Appeals for the Second Circuit is the only court which has held that a transfer between two intrastate correctional facilities of the same security classification and similar character, without the imposition of disciplinary punishment, may be a sufficiently substantial deprivation to invoke due process. Petitioners submit that such a transfer is not a very real or substantial loss in the constitutional sense of those terms and does not call for the due process procedures mandated by the Court of Appeals. The consequences of such a transfer are those suffered by every inmate who is transferred; they are in no way peculiar to an inmate who claims that his transfer was punitive. All of the courts which have considered transfers between institutions of the same custody level have specifically held that a summary transfer in that situation is not a violation of the inmate's constitutional right. E.g. *Schumate* v. *People of the State of New York, supra; Benfield* v. *Bounds, supra.*

The transfer cases in the federal courts which have mandated due process hearings (*ante* at 9-10) fall into two categories—those which require due process because the transfer is to an institution of a stricter security level, and those which require due process because the transfer is interstate. The rationale on which the courts have relied to mandate due process in these two categories has no application to the situation of an intrastate transfer between two facilities of the same security classification.

When an inmate is transferred to an institution of a stricter security classification he may lose certain privileges which he enjoyed at the prior institution. E.g. *Newkirk* v. *Butler, supra; Walker* v. *Hughes, supra; White* v. *Gilman, supra. Preiser* v. *Newkirk* will explore whether this loss is sufficiently grievous to invoke the due process clause. When an inmate is transferred to another institution of the same character and security classification, this factor is obviously lacking. The program opportunities and freedom of movement are essentially the same at the receiving institution as they were at the sending institution, and the diminution of privileges even less severe than the *Newkirk* situation.

These cases involving out of state transfers have stressed transfer consequences far more serious than those which occur in an intrastate transfer. These include the failure to supply records with resulting programs and treatment inconsistent with prior rehabilitation; serious problems of orientation in a totally new (that is, different state or federal) penal environment; lengthy administrative or quarantine segregation; failure to forward medical and psychiatric records with consequential denial of treatment; and the likelihood of a transfer to an institution a *great* distance from the sending facility. E.g. *Gomes* v. *Travisono, supra; Croom* v. *Manson, supra; Hoitt* v. *Vitek, supra.* When a transfer is made between two institutions in the same state these factors are absent and the rationale underlying the interstate transfer cases cannot be applied to the instant situation.

While not denying that an inmate may suffer some dislocation as a result of an intrastate transfer between two institutions of the same security classification, petitioners submit that the consequences of such a transfer are insufficient to be deemed a substantial deprivation in a legal sense or to invoke the Due Process Clause. In *Wolff* v. *McDonnell,* —— U.S. ——, 42 U.S.L.W. 5190 (June 24,

1974), this Court drew a distinction between the due process owed to a parolee facing revocation and an inmate facing disciplinary punishment within a prison, affording the latter less protection under the Due Process Clause. This Court also noted that the process due when an inmate faced good-time forfeiture or solitary confinement would not apply to situations in which lesser penalties were to be imposed. 42 U.S.L.W. at 5200, n. 19.

An inmate who is summarily transferred without the imposition of disciplinary punishment may suffer fewer deprivations in a legal sense than a prisoner summarily transferred for disciplinary reasons and placed in solitary confinement at the receiving institution. Likewise, an inmate transferred within a state to an institution of the same security classification may not suffer the same deprivations that are suffered by an inmate who is transferred out of state or to a stricter security facility. The instant case provides this Court with another opportunity to clarify the due process rights of inmates in these varying situations, particularly when the transfer is between institutions of the same custody level.

In light of the widespread and serious division of the lower federal courts on the rights of transferred prisoners; in light of a Court of Appeals' decision which fails to establish workable guidelines for its ruling; in light of the Court of Appeals' apparent conflict with its earlier holdings in *Newkirk,* and in light of this Court's grant of certiorari in *Preiser* v. *Newkirk,* petitioners believe that their application for certiorari should be granted in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 31, 1974.

Respectfully submitted,

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Appendix A.

Decision of the United States Court of Appeals for the Second Circuit, dated October 4, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 20—September Term, 1974

(Argued September 13, 1974 Decided October 4, 1974)

Docket No. 74-1208

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,
Petitioner-Appellant,
against

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, ... Smith, Deputy Superintendent, Attica Correctional Facility,
Respondents-Appellees.

Before: KAUFMAN, *Chief Judge,* SMITH and TIMBERS, *Circuit Judges.*

KAUFMAN, *Chief Judge:*

It is clear beyond cavil that American prisons have failed dismally to fulfill the ambition of contemporary penologists that prisoners should be treated and rehabilitated. Although it is impossible to deny that many are sentenced to prison as punishment, however, we cannot condone the idea

that the mere fact of incarceration permits a prisoner to be punished at the whim of those charged with his confinement. Rodney Haymes, formerly an inmate at New York's Attica Correctional Facility, initiated this § 1983 action seeking damages for the confiscation of a "legal petition" which he circulated while in custody there, and for his alleged summary punishment two days later by transfer without a hearing to the Clinton Correctional Facility. We reverse the summary judgment dismissing his complaint.

A brief recitation of the facts will aid in framing the issues we are called upon to decide. Haymes was discharged as inmate law clerk in Attica's law library on the morning of June 7, 1972. During the afternoon of that same day, prison authorities seized from Haymes a document which he was circulating among the inmates in the "A" block recreational yard. The writing, prepared by Haymes at the request of other prisoners and signed by 82 inmates, was addressed to Judge Curtin of the United States District Court for the Western District of New York. Although it requested no relief, the petition stated that the signatories were being deprived of legal assistance because of the removal of Haymes and John Washington, another inmate law clerk, from the library. The document charged that law library officer Edward Brady went "out of his way to circumvent inmates legal assistance." It also alleged this to be the reason for the removal of Haymes and Washington from their positions in the library.

Although no explanation for the confiscation was given at the time, Deputy Superintendent Harold Smith stated in an affidavit submitted in response to Haymes' complaint that the papers were seized because Haymes had not asked permission to circulate them, and none of the signers had requested legal assistance, despite the provision of Rule 21

of the Inmate's Rule Book:

> 21. Inmates are prohibited, except upon approval of the Warden, to assist other inmates in the preparation of legal papers.

While there is some question whether Rule 21 was in fact widely circulated,[1] Smith stated that Haymes had been cautioned on several occasions not to assist other inmates who had not requested and received approval. A notice from former Superintendent Montanye, posted on the cell block bulletin boards April 25, 1972, also stated:

> In all instances where inmates desire assistance in the use of the law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.
>
> Under no circumstances are inmates to set themselves up as "legal counselors" and receive pay for their services.

Haymes protested the confiscation, asserting that the petition was protected as a special letter under Administrative Bulletin #20, which provides:

> 9. Special correspondence to public officials: You may write to the President of the United States, Members of Congress, . . . and to any Judge. . . . The letter will not be read or censored.[2]

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[1] Haymes stated in his affidavit submitted to the district court that he had never been given a rule book, nor had one been published since 1969.

[2] N.Y. Dep't of Correction, Administrative Bull. No. 20, Jan. 31, 1972. The Bulletin was published shortly after this court decided, in *Sostre* v. *McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972), that censorship of inmate letters to courts, lawyers and public officials violated the first amendment rights of prisoners.

The real impact of the events leading to the seizure was felt when, two days later, on July 9, 1972, Haymes was transferred without a hearing from Attica to the Clinton Correctional Facility. Although both institutions are maximum security facilities, Clinton is several hundred miles farther away from Haymes' home in Buffalo. After his transfer, Haymes wrote twice to Superintendent Montanye protesting the confiscation of the papers and requesting their return. He received no response.

Haymes then began this § 1983 action,[3] alleging that his transfer without hearing to Clinton, in retaliation for his disobedience of Rule 21, deprived him of due process. His complaint also alleged that the petition being circulated was not "legal assistance" but "special correspondence" protected by Administrative Bulletin #20, and that its confiscation was therefore improper. He sought $1500 in compensatory damages for the time he was deprived of the document, and $1500 punitive damages "for the various acts of reprisals taken against" him. Haymes thereafter retained counsel. After considering affidavits and exhibits submitted to him, the judge, on Montanye's motion, "dismissed" Haymes's "application for relief under the Civil Rights Act." Since there is no indication that Judge Curtin found Haymes's claims to be frivolous, *see* 28 U.S.C. § 1915 (d), and because he considered matters outside the pleadings, *see* F.R.Civ.P. 12 (b), his disposition perforce was summary judgment. F.R.Civ.P. 56. Judge Curtin held that the seizure of the document, because it represented unauthorized legal assistance, was proper under Rule 21. He also found no violation of due process in Haymes's transfer. In effect, therefore, Judge

[3] 42 U.S.C. § 1983 (1970). Although the case has been characterized throughout as a habeas corpus proceeding, the district court properly treated it from the outset as an action under the Civil Rights statute.

Curtin decided that the alleged punitive nature of the transfer was not material. The district judge reasoned that, because no claim was made that "the facilities at Green Haven [sic] are harsher or substantially different from those afforded to petitioner at Attica," the defendants were entitled to judgment as a matter of law.

It is black letter law that the issue on an appeal from a summary judgment is whether the pleadings, affidavits, and other papers before the district court show a "genuine issue as to [some] material fact," requiring a trial, F.R.Civ.P. 56 (c). Haymes claims that the circumstances of his transfer raise two such issues: whether he was moved to Clinton Correctional Facility as punishment for his disobedience of prison rules and policies, and whether the effects of transfer were sufficiently harsh to make denial of a hearing a violation of due process. If the district court had permitted him to establish a punitive animus behind his transfer, the argument proceeds, he would not have been required to establish that Clinton's facilities were "substantially different" from those at Attica. Rather, Haymes argues, implicit in the very fact of his dislocation are deprivations at least as severe as those which may be imposed as punishment pursuant to the New York Correctional Rules and Regulations. Since some form of hearing is required before a misbehaving inmate can be made to suffer the specified sanctions, summary transfer for similar misbehavior may amount to a denial of due process. We see merit in this contention.

I.

We find it difficult, in the absence of a trial record, to look upon the circumstances of the transfer as a mere coincidence. The papers reveal that less than forty-eight hours after Haymes was ordered to cease collecting signatures without permission in the recreation yard, he was

shipped to the Clinton Correctional Facility hundreds of miles away. But in granting summary judgment, the district court deprived Haymes of an opportunity to prove a causal connection between the two events, finding in effect that the harm he suffered did not warrant affording a hearing irrespective of the motive for the transfer. We do not disagree with the assertion that not every inmate who must endure the burden alleged by Haymes deserves a full panoply of procedural armor. Removal of inmates to other facilities may be justified by any of a number of concerns quite proper to the administration of prison systems. One scarcely needs to be reminded of the sad events at Attica prison three years ago to understand the explosive potential flowing from the lamentable conditions which confront many prisoners. Although such circumstances neither excuse the need for reform nor justify sacrificing the inmate on the altar of security, they may on occasion render it necessary to take summary action to avert imminent riot. Overcrowding and the not unrelated hazards to health may also call for a prompt response by prison authorities. We certainly have no intention of unnecessarily placing prison officials in a straitjacket. But, generally, in such cases the reasons for transfer are extrinsic to the inmate's behavior, and the decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee. Moreover, although the dislocation suffered by the transferred prisoner may be burdensome, the need to avoid more general harm may outweigh his individual claim.[4]

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[4] After all these years of reviewing prison problems, we are not too myopic to notice the distinct possibility of arbitrary, misguided, or disingenuous invocation of administrative justifications for transfer. Although we must to some extent rely upon the good faith of prison officials, the individual inmate is not left unprotected against such abuses. *See Newkirk* v. *Butler,* Slip op. 3893, 3899 (2d Cir. June 3, 1974).

Transfer intended as punishment, however, presents a situation wholly different from the administrative removal of an inmate to another facility. When harsh treatment is meted out to reprimand, deter, or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish that he is not deserving of such handling. While some discretion may be appropriate in an administrative determination of the need to avoid violence and unrest, the specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior,[5] and to assess the effect which transfer will have on the inmate's future incarceration. Indeed, in situations where punitive sanctions other than transfer are imposed, the New York correctional system has established procedures which recognize both the demands of elementary fairness and the suitability of an impartial hearing. It is to these regulations that we now turn.

II.

Four years ago the New York Commissioner of Corrections published, pursuant to authority given him by statute, *see* N.Y. Correction Law §§ 112, 137 (McKinney Supp. 1974), Procedures for Implementing Standards of Inmate Behavior. 7 N.Y.C.R.R. §§ 250 *et seq.* These rules, presently in force, are intended to be applied in instances where an inmate violates a rule or regulation governing his behavior, or fails to comply with an instruction given him

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[5] *See Wolff* v. *McDonnell,* 42 U.S.L.W. 5190, 5196 (June 26, 1974) (holding that "[s]ince prisoners in Nebraska can loose good-time credits only if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.")

by an employee of the department of corrections. Section 250.1. The code provides that minor infractions may be dealt with merely by counsel, warning, or reprimand. Section 251.5. Other standards apply to more persistent refractory behavior, and to misbehavior involving danger to life, health, security, or property. Reports of such conduct are required to be made in writing to the superintendent, §§ 251.4, 251.5(b), and are reviewed at least weekly by the prison adjustment committee. Section 252.3(a)-(c). The committee also looks at the information in the inmate's file; it may direct a further investigation, and must "obtain from the inmate as full and complete an explanation of his behavior in the situation as possible." Section 252.3(c)-(e). With the concurrence of at least two of the three members, the committee may then impose limited restrictions, the most serious of which is confinement in a special housing unit for a period of one week. Section 252.5. Where punitive sanctions are to be imposed, a "superintendent's proceeding" is provided before an impartial employee, at which formal written charges are filed, and notice and assistance given the inmate. The charge must be supported by substantial evidence, which is to include an interview with one or more of those who witnessed the incident. Sections 253.1 to 253.4. Punishment may then be imposed, includiing loss of privileges, change of program, confinement up to 60 days, special diet, loss of good behavior allowance ("good time"), and a requirement of restitution for intentional damage to state property. Section 253.5. Transfer is not specified among the sanctions to which a superintendent's proceeding may give rise.[6]

[6] The authority to transfer inmates is given by § 23 of the Correction Law, N.Y. Correction Law § 23 (McKinney Supp. 1974),

(footnote continued on following page)

We have recounted New York's prescribed procedure at some length in order to emphasize the disparity in treatment accorded inmates punished thereunder, and those who are summarily transferred for rule infractions. Had Haymes' action in circulating the petition been considered merely a minor infraction, it ordinarily would have received nothing more than a reprimand. Had it threatened danger to prison security, or had Deputy Superintendent Smith's allegation that Haymes had on other occasions rendered unauthorized legal assistance proved true, a report would have been filed for adjustment committee review. If Haymes had been thought to deserve one of the enumerated punitive sanctions, a full superintendent's proceeding would have been held. It is, of course, much to the credit of the New York correctional system that such thorough, specific, and sensitive procedures have been codified to govern the enforcement of standards for inmate behavior. But it would be anomalous indeed, "both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls." *Gomes* v. *Travisono,* 490 F.2d 1209, 1215 (1st Cir. 1973).

III.

Haymes' allegation that his transfer was intended as punishment for his violation of Rule 21 would not merit

(footnote continued from preceding page)

which provides:

> 1. The commissioner of correction shall have the power to transfer inmates from one correctional facility to another. . . . The transfer shall be in accordance with rules and regulations promulgated by the department for the safe delivery of such inmates to the designated facility.

No provisions are set out governing the proper occasions for transfer, or the procedure for determining whether such an occasion in fact exists.

relief, however, absent a showing that the move to the Clinton Correctional Facility in fact had consequences sufficiently adverse to be properly characterized as punitive. In granting summary judgment, the district court found that there was no allegation that the facilities at Clinton were "harsher or substantially different from those afforded to petitioner at Attica," citing *Wells* v. *McGinnis,* 344 F. Supp. 594, 596 (S.D.N.Y. 1972) (administrative transfer). Whatever may be the standards governing the need for hearing prior to administrative transfers, however, *see Newkirk* v. *Butler, supra,* note 4, we do not think it dispositive that both Attica and Clinton are maximum security facilities with similar programs. Rather, we find that the hardship involved in the mere fact of dislocation may be sufficient to render Haymes' summary transfer—if a trial establishes that it was punitive—a denial of due process.

The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, Haymes found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility, 7 N.Y.C.R.R. Part 260; personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment, *see Hoitt* v. *Vitek,* 361 F. Supp. 1238, 1249 (D.N.H. 1973); and educational and rehabilitative programs can be interrupted. Moreover, the

fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom. One can easily comprehend the bitterness which may be engendered by the capricious infliction of such unwarranted sanctions.[7] Small wonder, then, that the American Correctional Assocation has recognized that "[i]n any penal system embracing several institutions, transfer from one to another is often an effective disciplinary procedure as well as an administrative necessity." American Correctional Ass'n, Manual of Correctional Standards 416 (1972).

IV.

Because of the disposition we reach upon Hayme's claim that his transfer without hearing may have denied him due process if it was punitive in nature, we need not consider whether a genuine issue of material fact is raised by the allegation that the confiscated petition was special correspondence protected by Administrative Bulletin #20. We note, however, that the mere fact that the petition requested no relief does not automatically withdraw it from the category of "legal assistance" governed by Rule 21. If those who signed the letter did not expect the court to act on it of its own accord—a fact which is not at all clear—they at least thought, as Hayme's brief admits, that the

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[7] Although Hayme's complaint did not recite many of the deprivations we have enumerated, it is important to note that he was able to retain counsel only shortly before the district court rendered summary judgment. We think it proper that "the allegations of [a] *pro se* complaint [should be held] to less stringent standards than formal pleadings drafted by lawyers . . . ." *Haines* v. *Kerner,* 404 U.S. 519, 520 (1972) (per curiam). The charge that he was punished by the fact of transfer at least entitled Haymes to a hearing to explain why the transfer was onerous to him.

matter would be "referred . . . for investigation to other agencies, such as the FBI, interested public interest lawyers, or others . . ."

Nor do we think that the prohibition of unauthorized legal assistance should be rendered nugatory in any situation where the product of the forbidden collaboration happens to be a letter written to a public official. The concern underlying prison rules on legal assistance is that "strong-willed inmates might exact hidden and perhapus non-monetary fees" in return for legal advice, thereby presenting a menace to prison discipline. *See Sostre* v. *McGinnis*, 442 F.2d 178, 202 & n.47 (2d Cir. 1971) (en banc), *cert. denied*, 404 U.S. 1049 *and* 405 U.S. 978 (1972); *Johnson* v. *Avery*, 393 U.S. 483, 488 (1969). It would be shortsighted indeed to permit subversion of this obviously rational policy by so transparent a ruse as a mere change of salutation on legal documents.

Reversed.

APPENDIX B.

Opinion of the District Court, dated June 4, 1973.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 1972-410

UNITED STATES OF AMERICA ex rel. RODNEY R. HAYMES,

Petitioner

—vs—

ERNEST L. MONTANYE, Superintendent, Attica Correctional Facility, and Agent . . . . . SMITH, Deputy Superintendent Attica Correctional Facility,

Respondents

CURTIN, D.J.

This action began with a communication from petitioner to this court alleging that a document was seized from him by correctional authorities. Petitioner also alleged that two days after this document was seized, he was transferred from Attica Correctional Facility to Clinton Correctional Facility. Petitioner further alleged that two subsequent letters to Superintendent Montanye failed to effect the return of the confiscated document to petitioner.

In an order dated August 3, 1972, this court construed petitioner's communication as an application for relief under the Civil Rights Act (42 U.S.C. § 1983; 28 U.S.C. § 1343), and ordered the respondents to show cause why petitioner should not be allowed to proceed further.

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Included in respondents' answering papers to that order is the confiscated document that is the subject of this action. This document is in the form of a letter to this court, signed by 82 Attica inmates, charging that, because of the removal of petitioner as a law clerk in the prison library at the Attica Facility, they are denied adequate access to the courts. Also included in respondents' answering papers are affidavits from Edward V. Brady, Correctional Officer at the Attica Correctional Facility, and Harold Smith, Deputy Superintendent at the Attica Correctional Facility. These affidavits state that not long after petitioner's removal from his position as clerk in the law library at the Attica Correctional Facility, he was seen circulating a document in the recreation yard of the Attica Facility. Pursuant to the Attica rules which forbid inmates to provide legal assistance to other inmates without the approval of the Superintendent, the document was seized from him.

Petitioner submitted a reply to respondents' affidavits in which he moved to amend his original application to include Edward Brady as a respondent. That motion is granted and Mr. Brady is named as a respondent.

Subsequent to petitioner's reply, Herman Schwartz and Edward I. Koren of Buffalo, New York, who were retained as counsel by petitioner, have submitted a memorandum of law.

The court will consider each claim raised by petitioner and his counsel separately. Petitioner's original communication to this court alleges that the document seized by correctional authorities was a "legal petition" addressed to this court. He maintains that the seizure denies him adequate access to the courts. In response to this allegation, respondents state that the rules of the Attica Correctional Facility provide that inmates can give

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legal assistance to other inmates only if the request for such assistance is made through the law librarian of the Attica Facility.

This rule is not unreasonable as long as permission for inmates to assist each other is freely given. *See Johnson* v. *Avery,* 383 U.S. 483 (1969); *Sostre* v. *McGinnis,* 442 F.2d 178, 201 (2d Cir. 1971); *United States ex rel. Stevenson* v. *Mancusi,* 325 F. Supp. 1028 (W.D.N.Y. 1971); *In the Matter of the Application of William J. Kruth,* Civil No. 1972-230 (W.D.N.Y., Nov. 14, 1972).

The affidavit of Edward V. Brady, the law librarian at the Attica Facility, states that none of the 82 signatories of the seized letter ever asked for legal assistance. Petitioner's response to the affidavit does not controvert this fact. The court finds there has been no violation of petitioner's rights under *Johnson* v. *Avery, supra,* and subsequent cases.

Counsel for petitioner views the facts in this case somewhat differently, arguing that petitioner was not providing legal assistance to other inmates but was circulating a document seeking joint action to protest certain prison conditions, and that in retaliation for circulating this document, it was seized and petitioner was subsequently transferred. However, the court determines that, under the circumstances, the authorities had the right to seize the petition. *Christman* v. *Skinner,* 468 F.2d 723, 725 (2d Cir. 1972). The petitioner's right to communicate with the court or with counsel was not infringed.

The transfer of the petitioner from Attica to Green Haven did not violate petitioner's rights. Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at Green Haven are harsher or substantially different from

those afforded to petitioner at Attica. *See Wells* v. *McGinnis*, 344 F.Supp. 594, 596 (S.D.N.Y. 1972). Petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates.

Petitioner's application is dismissed.

Permission to appeal in forma pauperis is denied, with the qualification that the Clerk is directed to file a notice of appeal from this decision without the prepayment of the filing fee.

Further requests for permission to appeal in forma pauperis should be directed, on motion, to the United States Court of Appeals for the Second Circuit, Foley Square, New York City, in accordance with the requirements of Rule 24(a) of the Federal Rules of Appellate Procedure.

So ordered.

/s/
JOHN T. CURTIN
United States District Judge

Dated: June 4, 1973.